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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 657

MILTON DUKE, MORTON L. KEMPER AND JOHN S. MAHLE, RECEIVER OF THE BOND CONSTRUCTION CORPORATION,

Petitioners,

VS.

RECONSTRUCTION FINANCE CORPORATION, VICTOR FRENKIL, INDIVIDUALLY AND TRADING AS BALTIMORE CONTRACTORS, BALTIMORE CONTRACTORS, INC. AND UNITED STATES CASUALTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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The Daily Record Co., Baltimore 3, Md.

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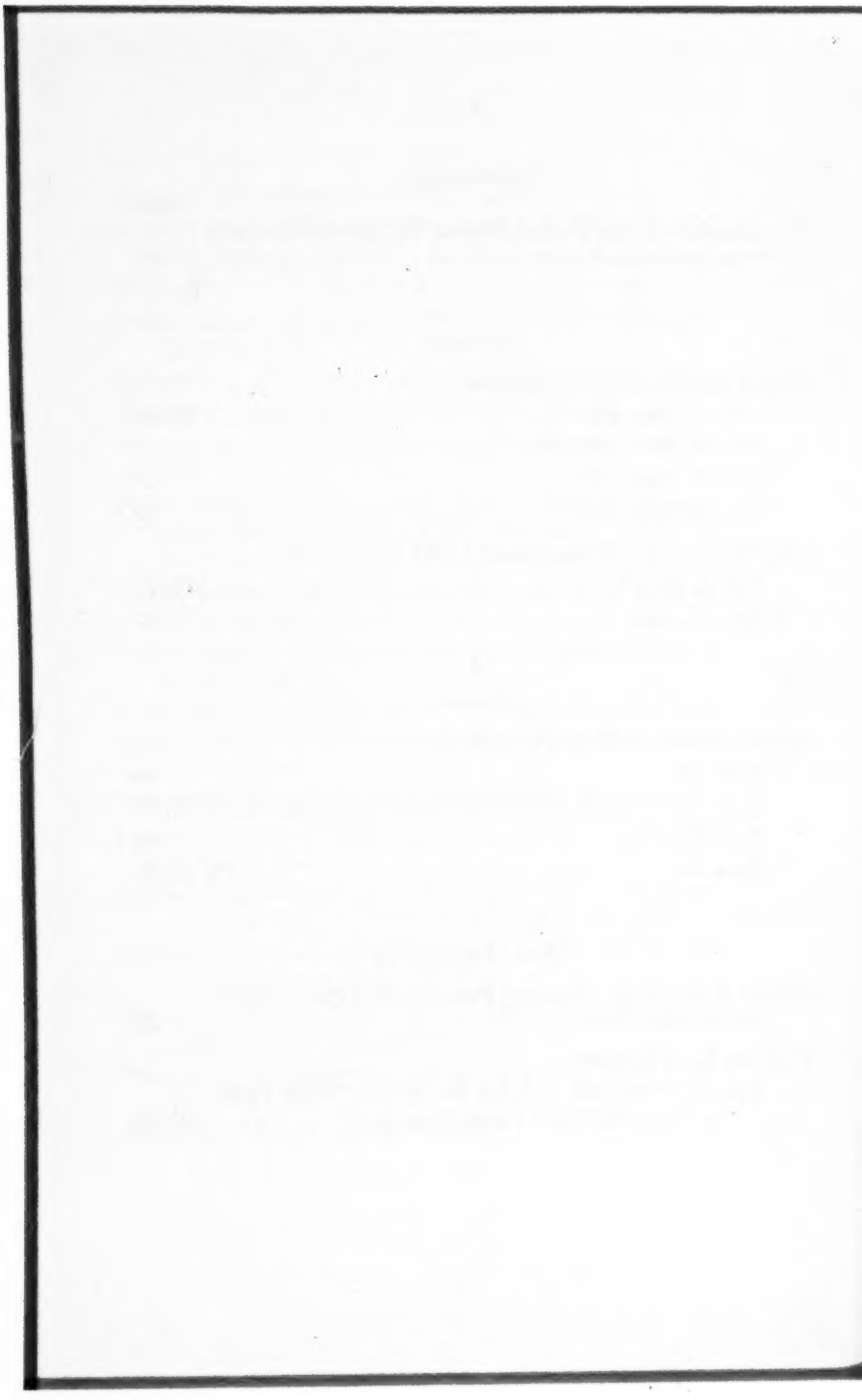

IN THE

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OCTOBER TERM, 1953

No. ------

MILTON DUKE, MORTON L. KEMPER AND JOHN S. MAHLE, RECEIVER OF THE BOND CONSTRUCTION CORPORATION,

Petitioners,

VS.

RECONSTRUCTION FINANCE CORPORATION, VICTOR FRENKIL, INDIVIDUALLY AND TRADING AS BALTIMORE CONTRACTORS, BALTIMORE CONTRACTORS, INC. AND UNITED STATES CASUALTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, Milton Duke, Morton L. Kemper and John S. Mahle, Receiver of the Bond Construction Corporation, respectfully pray that a Writ of Certiorari be issued out of and under the Seal of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit affirming (a) a Judgment entered April 17, 1953, after a partial trial of the case on the merits, in favor of the Original Plaintiff, Reconstruction Finance Corpora-

tion, against the Original Defendants, Milton Duke and Morton L. Kemper, jointly and severally, in the amount of $34,603.51, with interest from April 17, 1953 until paid and costs of suit, and (b) an Order of the District Court dated April 22, 1953 dismissing the Third Party action against Victor Frenkil, individually and formerly trading as Baltimore Contractors, and Baltimore Contractors, Inc., and vacating the Order of Court dated October 15, 1951 allowing said Third Party Defendants to be impleaded.

JURISDICTION

Jurisdiction to review this action upon a Writ of Certiorari is conferred upon this Court by 28 U. S. C. §1254(1).

The Opinion of the Court of Appeals for the Fourth Circuit (by Dobie, Ct.J.) was filed on January 4, 1954 (R. 261). The Mandate has been stayed in the Court of Appeals by two Orders dated January 28, 1954 (R. 270) and February 27, 1954 respectively.

OPINIONS BELOW

The "First Opinion" of the District Court (Coleman, C.J.) appears in the Record at pages 182-186; the "Second Opinion" of the District Court (Coleman, C.J.) appears in the Record at pages 200-213 and in 18 Fed. Rules Serv. 14a-15, Case 2.

The Opinion of the Court of Appeals appears in the Record at pages 261-269 and in 209 F. 2d 204.

STATEMENT OF THE MATTER INVOLVED

In 1944, Victor Frenkil, trading as Baltimore Contractors (hereinafter referred to as "Frenkil") then operating as an individual proprietor, entered into a Contract as Prime Contractor, with the District of Columbia, as Owner, to

build the Fort Stanton Reservoir for $164,375.00 (R. 11-12, 46-47).

Substantially all of the work was subcontracted by Frenkil. The first Subcontract was between Frenkil and Atlas Crane and Excavating Company, Inc. for excavation work in the amount of $55,000.00. The second Subcontract, the one involved in this case, was for the concrete work. It was executed on January 4, 1944 between Frenkil and Bond Construction Corporation (hereinafter referred to as "Bond") (of which Corporation Milton Duke was President) and Duke individually (R. 242-244). The amount of this second Subcontract was $85,400.00. This Contract provided for progress payments of 90% of the work performed in any month on the 10th of the following month after acceptance of the work and payment therefor by the Owner, the District of Columbia (R. 244).

In order to finance the work under the Bond Subcontract, Bond and Duke applied for a loan from Reconstruction Finance Corporation (hereinafter referred to as RFC) (R. 216). This loan was granted and several connected documents were signed on the same day, March 16, 1944, in connection with a loan of $71,500.00 which was to be made on certain conditions.

The Contract Documents*

The documents relating to the loan were as follows:

1. *Loan Authorization* (R. 218).

This is the basic document in the entire transaction and outlines the terms upon which RFC will advance the $71,-

* Several of the Contract Documents, although referred to in other documents are not in the Record because of the premature action of the District Court in entering Judgment for RFC before the Original Defendants had completed their case.

500.00 to be loaned Bond. Eleven words were added to the Loan Authorization subsequent to its original preparation.

The Loan Authorization indicates that the following documents, in addition to the Loan Authorization, will make up the Contract.

2. The *Note* signed by Bond dated March 16, 1944 for $71,500.00 (R. 220).

3. The *Assignment* of March 16, 1944, executed by both Bond and Duke, of all moneys due or to become due under the Bond Subcontract in the amount of $85,400.00. This absolute Assignment was received and accepted by Frenkil on March 24, 1944, he adding the written words "subject to all conditions of the contract" (R. 244-247).

4. *Agreement of Bond* that all Contracts presently assigned to RFC shall constitute collateral for the loan.

5. *Guaranty* of Duke and Morton L. Kemper. This printed form recites that the Note of March 16, 1944 had been given (R. 225-229). RFC was given broad powers to deal with the collateral (which includes "guaranties" and "agreements" (R. 226)) with one important exception. This exception is—

> "subject to the provisions of any agreement between the Debtor or any other party and Reconstruction Finance Corporation at the time in force," (R. 226).

The Guaranty Agreement also provides that RFC shall not be liable—

> "by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral unless * * * caused by the willful act or willful failure to act of Reconstruction Finance Corporation" (R. 226).

6. *Guaranty* of Harry Duke (not a party to the case at bar) limited to an amount not in excess of $12,000.00, to be secured by United States Government Bonds in an amount not less than $6,000.00 (R. 238-242).

7. *Affidavit* of Bond that it had not paid any bonuses or commissions to obtain the Contract.

8. *Stand-by Agreement* to be executed by William Hoffenberg covering a $5,000.00 advance made to Bond.

9. *Loan Agreement dated March 10, 1944* limiting the use of the proceeds of the loan, as set forth in the Loan Authorization, and setting forth certain provisions in regard to reimbursable expenses, application of payments, disbursements and compensation.

10. *Disbursement* which is to be on the budget plan against copies of invoices, provided a sum not in excess of $12,000.00 may be disbursed prior to receipt of copies of invoices, unpaid balance of loan not to exceed $35,000.00 at any time.

The Loan Authorization was approved by the Agency Review Committee of RFC on March 9, 1944. The Loan Agreement was dated March 10, 1944. All the other documents were executed simultaneously at the RFC Office in Baltimore on March 16, 1944.

THE PRACTICE UNDER THE ASSIGNMENT OF MARCH 16, 1944

The Assignment was absolute and complete from Bond and Duke individually to RFC and transferred completely to RFC "all the assignor's right, title and interest in and to all monies due, or to become due" from Frenkil under the Subcontract of January 6, 1944.

Bond, although notified on February 18, 1944 to begin the work which was to be completed within 120 days from that

date, was not permitted to begin the work because of the controversy between Frenkil and Atlas, the excavator (R. 13, 47). Frenkil was not paying Atlas any money, representing to Atlas that Frenkil was not being paid by the District of Columbia. Finally Atlas left the job in May, 1944, and Frenkil took over the excavation work. Thereafter Bond began the concrete work and proceeded with the work under the Subcontract. Bond also completed extras in the approximate amount of $34,000.00, at Frenkil's direction.

On March 28, 1944, RFC advanced Bond $7,000.00. Bond repaid $3,064.12 on April 29, 1944. On June 10, 1944 Bond, in accordance with the Contract documents and the Assignment presented to Frenkil Requisition No. 1 for $4,843.98. This was duly approved by Frenkil or one of his agents. It was then sent to RFC which on the same day advanced Bond $5,050.00.

This same type of financing went on during 1944, as set out in Duke Exhibit No. 1 (R. 251). Frenkil paid Requisitions Nos. 1, 2 and 3 in the amount of $4,843.98, $11,608.02 and $7,760.70 respectively, a total of $24,212.70. On August 30, 1944 Frenkil or his agent approved Requisition No. 4 for $10,761.30, and on September 22, 1944 approved Requisition No. 5 for $9,126.00, a total of $19,887.30 (R. 247-248). In due course, after these Requisitions were received by RFC, additional amounts, not exceeding $12,000.00 in accordance with the Loan Authorization, were advanced by RFC, as shown on Duke Exhibit No. 1.

Subsequently Frenkil fraudulently withheld payment of Requisitions Nos. 4 and 5 and declined to pay Bond for the extras amounting to some $34,000.00. It is charged in the Third Party Complaint (R. 16-17) that the failure to pay Requisitions 4 and 5 and to pay for the extras was because

of the knowingly false representation made by Frenkil that he was not being paid for the work by the District of Columbia, as Owner under the Prime Contract. This false representation was believed by Bond and because of the financial situation, the work on October 11, 1944 was turned over to Frenkil for completion on a reasonable cost basis as estimated without any overhead or profit.

It was later discovered that more than the amount of the work appearing on the unpaid Requisitions had been in fact accepted by the District of Columbia and payments in much larger amounts had in fact been paid to Frenkil for this work (R. 74), so that he could and should have paid Requisitions 4 and 5, and the cost of the extra work promptly.

Bond later went into Receivership, and John S. Mahle, one of the Petitioners, was appointed Receiver of Bond by the Circuit Court No. 2 of Baltimore City. After this Receivership, RFC filed a claim in the Receivership Estate for the same amount it claimed from the Guarantors (R. 117). The Receiver of Bond demanded that RFC proceed against Frenkil to recover the balance due it or permit the Receiver (who was otherwise powerless to take affirmative action because of the Assignment) to proceed for the losses and damages resulting to Bond and the Bond creditors from the unlawful conduct of Frenkil in the matter (R. 66, 67). RFC declined to proceed against Frenkil and after approximately six and one-half years filed the Original Complaint on March 13, 1951 against Duke and Kemper under the Guaranty Agreement.

Proceedings in the District Court

1. *Original Complaint.*

The Original Complaint, filed by RFC six and one-half years after Frenkil's fraud, alleged Federal jurisdiction

based on the laws of the United States. RFC is a corporation created by an Act of Congress and is empowered to sue in any State or Federal Court. The Government is the owner of all of its capital stock and the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00. The Original Complaint declared on the Note of March 16, 1944, the Guaranty of Duke and Kemper of March 16, 1944 and a Schedule of Payments showing a balance due of $31,347.27.

2. *Third Party Complaint.*

Prior to answering the Original Complaint, Duke and Kemper, the Original Defendants, on June 22, 1951 filed a Motion to make Frenkil and Baltimore Contractors, Inc. (which Corporation had taken over the business, the assets and liabilities of the individual proprietor) Third Party Defendants (R. 10). At the same time, Duke and Kemper filed a Third Party Complaint against Frenkil and Baltimore Contractors, Inc. The Third Party Complaint (R. 11) recites that if the Original Plaintiff, RFC, is entitled to recover all or any part of the amount claimed for which the Plaintiff has demanded Judgment, the Defendants may recover such amount from Frenkil and Baltimore Contractors, Inc. for the reasons set forth. This allegation follows precisely the language of Rule 14 of the Federal Rules of Civil Procedure in regard to Third Party Practice.

The allegations in the Third Party Complaint set forth with particularity the execution of the Prime Contract, the execution of the Subcontract, the financing of Bond and Duke by RFC with the Note, Guaranty, the Assignment and the failure to obtain an Apportionment Agreement from United States Casualty Company, the surety on the bond of Bond, as was agreed would be done, together with the fraudulent scheme and representations by Frenkil, the

reliance on those representations and the receivership of Bond. It is also alleged that as result of Frenkil's fraud, Bond and Duke suffered a net loss of $95,513.79. It is also alleged that pursuant to the Assignment, which Frenkil had accepted, "an amount sufficient to pay all the claims of RFC should have been paid by Frenkil from the sums due Bond and Duke as above set forth, so that if Frenkil had carried into effect his obligations instead of wrongfully, unlawfully and fraudulently defaulting thereon, RFC would have been paid in full for any balance due it as set forth in the Original Contract or otherwise." Duke and Kemper demanded Judgment against the Third Party Defendants, Frenkil and Baltimore Contractors, Inc., for all sums that may be adjudged against Duke and Kemper in favor of the Original Plaintiff, RFC.

Answer of the Original Defendants

The following day, June 23, 1951, the Original Defendants filed their Answer to the Original Complaint, setting up a number of defenses.

1. The first affirmative defense is in Paragraph 9 of the Original Answer (R. 21-28) which sets out in substantially the same words of the Third Party Complaint the fraudulent scheme, the reliance upon it, the loss of $95,513.79. It is alleged that (a) RFC knew that Bond and Duke had performed the extra work and the work under the Subcontract, (b) it knew that Frenkil was not paying for the work pursuant to the Assignment, (c) it knew that Frenkil had made the representations, (d) it knew, or by the exercise of reasonable diligence should have known, that the representations were false and known by Frenkil to be false and made by him with the express intent of deceiving Bond and Duke, (e) notwithstanding all of which, RFC wilfully failed to act reasonably and properly in the premises and

took no step and did no act to require and compel Frenkil to make payments in accordance with the Assignment, and (f) if RFC had not wilfully failed to act as it was required to act, it would have been paid in full.

2. In Paragraph 10 of the Original Answer (R. 28) the defense of laches is asserted, pointing out the delay of approximately 6½ years in attempting to collect from Frenkil from October 15, 1944 and prejudice to Duke and Kemper.

3. In Paragraph 11 of the Original Answer, it is alleged that RFC either knew or should have known of Frenkil's fraudulent conduct but wilfully participated in and acquiesced in it, as a consequence of which Duke and Kemper have been discharged from their guaranty.

4. In Paragraph 12, the wilful failure of RFC to obtain the Apportionment Agreement, as agreed, and the prejudice resulting therefrom is alleged to have discharged Duke and Kemper from liability under the Guaranty.

5. In Paragraph 13 (R. 28-29), it is alleged that the Guarantors are discharged from their guaranty because of the wilful advance by RFC to Bond in excess of $12,000.00, set forth in the loan arrangement.

Motion To Dismiss The Third Party Complaint

On July 10, 1951 Frenkil and Baltimore Contractors, Inc., the Third Party Defendants, filed a Motion to Dismiss the Third Party Complaint. This came on for hearing in the District Court (Coleman, C.J.) on October 12, 1951 (R. 30). This matter was fully heard by the District Court, all Counsel being present, and the Court indicated that it would grant the Motion of the Original Defendants and Third Party Plaintiffs to make Frankil and Baltimore Contractors, Inc., Third Party Defendants and would deny the Motion of Frankil and Baltimore Contractors, Inc., to Dis-

miss the Third Party Complaint. A formal Order of October 15, 1951 was filed in the case (R. 43).

At the hearing on October 12, 1951, the District Court had indicated to Counsel for Frankil and Baltimore Contractors, Inc., that if the Third Party Defendants desired to make the Bond Receiver and United States Casualty Company, Surety on the Bond Subcontract, Fourth-Party Defendants, the Court would grant permission that this be done. Neither the Original Plaintiff nor the Original Defendants had any objection to this procedure (R. 38-40).

Fourth Party Complaint

On October 31, 1951, Frenkil and Baltimore Contractors, Inc., as Third Party Defendants, filed a formal Motion to make the Receiver of Bond and United States Casualty Company, Fourth Party Defendants and filed a Fourth Party Complaint (R. 44). On the same day, the Third Party Defendants filed their Answer to the Third Party Complaint (R. 46).

Frenkil and Baltimore Contractors, Inc., (but not U. S. Casualty — R. 52) petitioned the State Equity Court, having jurisdiction of the Bond Receivership, and obtained permission of that Court to join the Bond Receiver in the federal suit (R. 54, 55).

Answers And Counter-Claims Of Fourth Party Defendants

On November 21, 1951, United States Casualty filed its Answer to the Fourth Party Complaint claiming that, as surety, it had sustained and paid a loss of $5,109.14, for which it demanded Judgment against the Bond Receiver and Duke. On November 30, 1951 Duke replied to this claim and on March 22, 1952, the Bond Receiver also answered this claim.

On March 22, 1952, the Bond Receiver answered the Fourth Party Complaint and asserted a Counter-Claim against both Frenkil and Baltimore Contractors, Inc. *and* RFC, the Original Plaintiff arising out of the same subject matter (R. 54).

In the Bond Receiver's Counter-Claim the same facts as appear in the Answer of the Original Defendants and in the Third Party Complaint in regard to the false and fraudulent representations are alleged by the Bond Receiver. In addition to these same facts, it is alleged in the Counter-Claim that Frankil knew that it was imperatively necessary for him to make the payments required under the Subcontract punctually and strictly in accordance with its terms. It is then alleged that the Bond Receiver made demand upon Frenkil, but the Assignment of March 16, 1944 acted as an impediment to any action that the Bond Receiver had in contemplation to protect the interests of the creditors of the insolvent estate. It is also alleged that the neglect and refusal of RFC to take appropriate action against Frenkil, and his successor corporation, under the Assignment has greatly prejudiced the Receiver in the administration of the Receivership Estate and the general creditors of Bond. It was prayed that the Assignment be declared to be of no further force and effect (rather than to insist upon exoneration) and that Judgment might be entered against Frenkil and Baltimore Contractors, Inc., for such amount as may be determined to be due from them, or either of them, to Bond.

On May 28, 1952, RFC, the Original Plaintiff, filed an Answer to this Counter-Claim (R. 68). Frenkil and Baltimore Contractors, Inc. filed their Answer to this Counter-Claim on October 31, 1952 (R. 79).

Preparation For Trial

Duke on April 3, 1952 took a substantial Deposition of Frankil which was filed in the case. The Original Defendants filed an elaborate Request for Admissions under Rule 36 of the Federal Rule of Civil Procedure, and RFC, the Original Plaintiff, also filed a substantial Request for Admissions. Shortly before the trial, there was a Pre-Trial conference, held at the request of Counsel for the Third Party Defendants, to work out in advance of trial the nature of proof required for the establishment of vouchers and documents in connection with the cement work and extras performed by Bond for Frenkil (R. 85, 136).

Partial Trial In The District Court

The case came on for hearing on the merits on November 3, 1952. The Original Defendants had issued Summonses for Frenkil and other witnesses and were fully prepared to proceed with the trial on all of the issues raised.

One of the issues raised was that there had been an alteration in the Loan Authorization and that this, under the Law, results in a discharge of the Guarantors. The District Court desired to hear the testimony on this issue *first* on the theory that if it were sustained, it would dispose of the claim of the Original Plaintiff (R. 87-88). Testimony on this issue was taken in full and *part* of the evidence relating to the other issues in both the Original Complaint, the Third Party Complaint and the Fourth Party Complaint was also taken. See Plaintiff's Exhibits 1-19, Frenkil Exhibits 1-9, Duke Exhibit 1, Bond Receiver Exhibit 1.

On November 6, 1952, the District Court rendered an oral opinion indicating that it would not find that the alteration was made subsequent to the integration of the documents

and ruled against the Original Defendants on that issue (R. 182). At that time, the Third Party Defendants, Frenkil and Baltimore Contractors, Inc., made an oral Motion to dismiss the Third Party Complaint (R. 189). This was argued, and it was pointed out to the District Court that the Original Defendants had not yet completed their case on the issues raised by the Original Complaint and that in any event the Third Party Complaint should not be dismissed (R. 186).

The matter was taken sub curia, and Briefs were filed by the parties.

On March 31, 1953, the District Court granted the Motion of the Third Party Defendants to vacate the District Court's Order of October 15, 1952 (R. 200).

On April 17, 1953, the District Court, *without taking further testimony or hearing further argument,* entered Judgment in favor of the Original Plaintiff, RFC, against the Original Defendants, Duke and Kemper, jointly and severally in the amount of $34,603.51, with interest from April 17, 1953 until paid and costs of suit (R. 5, 214).

On April 22, 1953, five days after the Judgment was entered, the District Court passed a formal Order dismissing the Third Party action against Frenkil and Baltimore Contractors, Inc., and vacating the Order of October 15, 1951 allowing Frenkil and Baltimore Contractors, Inc. to be impleaded.

Appeals were taken by Duke, Kemper and the Bond Receiver from these Orders on April 29, 1953 to the Court of Appeals for the Fourth Circuit. The Judgment and Order of the District Court was affirmed by that Court on January 4, 1954 (R. 269-270).

QUESTIONS PRESENTED

1. May a District Court, after it has overruled a Motion to Dismiss a Third Party Complaint and has formally ordered, after hearing, that Third Party Defendants be joined in an action in the District Court, pursuant to Rule 14 of the Federal Rules of Civil Procedure, during the course of the trial on the merits over a year and one-half later, but before the trial has been completed, revoke its prior Order joining the Third Party Defendants and dismiss the Third Party Complaint, when Federal jurisdiction of the original Complaint is predicated upon the Laws of the United States and is not challenged by any of the parties and when the Third Party Defendants have themselves invoked Rule 14 to bring in Fourth Party Defendants who have asserted affirmative claims against other parties including the Original Plaintiff?

2. May a District Court enter Judgment against the Original Defendants in favor of the Original Plaintiff prior to hearing testimony and argument on most of the issues raised by the Pleadings, including the issue of fraud?

3. In a suit between the original parties to a transaction, may a District Court render Judgment against the Original Defendants as uncompensated Guarantors on a guaranty and disregard the other Contract documents entered into on the same day as a part of the same transaction and other Contract documents referred to therein?

These questions were answered in the affirmative by the Court of Appeals, but it is submitted that this action was erroneous.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court.

The Court of Appeals, in affirming the District Court, held that the District Court had the power to vacate, and did not abuse its power in vacating, the District Court's prior Order permitting the joinder of the Third Party Defendants and the District Court's prior Order overruling the Motion to Dismiss the Third Party Complaint during the course of the trial of the case on the merits approximately a year and a half later but before the full case had been heard, in a case in which Federal jurisdiction of the Original Complaint was predicated upon the Laws of the United States and was not challenged by any of the parties and in which the Third Party Defendants have themselves invoked Rule 14 to bring in Fourth Party Defendants who have asserted claims against other parties including the Original Plaintiff.

This Court has held that Rule 14 should be liberally construed to accomplish the beneficent purposes of the Rule, i.e. the saving of time and money by the avoidance of circuity of action and unnecessary litigation. *United States v. Yellow Cab Company,* 340 U. S. 543, 556, 95 L. Ed. 523 (1951 — Burton, J.).

If the decisions of the District Court and Court of Appeals are allowed to stand in this case, the effectiveness of Rule 14 will be greatly, if not completely, impaired and a harsh, technical and narrow construction of the Rule will prevail, contrary to the public policy on which Rule 14 is grounded.

In addition to this important public consideration, the opinion and guidance of this Court is desperately needed

to bring order out of the judicial conflicts which now exist in the Circuit and District Courts in the application of Rule 14. This case is not only a classic case for the application of Rule 14 but is uniquely adapted to enable this Court to clarify and settle the law applicable to the important procedural reform embodied in Rule 14. The Third Party action clearly arises out of the same factual situation giving rise to the original action and the Pleadings set forth the same facts. The fraud of Frenkil caused all of the losses involved — the loss to RFC, the loss to Bond, the loss to the Bond Surety and the litigation on the Duke and Kemper Guaranty. The Guaranty sued on in the original action was only one document in the financing of the Fort Stanton Reservoir project. The attempted severance of that one document from the other documents and from the entire factual situation and the dismissal of the very party whose misconduct caused all of the loss, is unrealistic and contrary to modern concepts of proper judicial procedure. This Court should grant certiorari and clarify the thinking of the Lower Federal Courts in regard to Rule 14. The hard and effective work of this Court and of its Committee in promulgating Rule 14 should not be destroyed by technical, harsh and narrow judicial construction in the Lower Federal Courts.

II. The Court of Appeals has sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

By affirming a Judgment of the District Court for the Original Plaintiff against the Original Defendants as uncompensated Guarantors before these Original Defendants had introduced their evidence or argued most of the defenses raised in the Pleadings in the Original Answer to the Original Complaint.

The fact that testimony had not been taken on most of the defenses was called to the District Court's attention before the Court entered the Judgment so that the District Court was fully advised of the fact that the case had not been completed. The issues of wilful participation in Frenkil's fraud by RFC, a wholly-owned Government Corporation; of laches in failing to file suit for approximately six and one-half years, for wilful neglect in proceeding against Frenkil to the prejudice of the uncompensated Guarantors of failure to obtain an Apportionment Agreement as agreed; — were all issues raised by the Original Pleadings and are issues on which it was necessary, in order to satisfy the requirements of due process of law, to take testimony, hear argument and *then* determine the matter.

The District Court's action in this case not only deprived the Third Party Plaintiffs and the Fourth Party Defendants of due process of law in the procedural sense, but the result was to prevent a trial of the issues of fraud and the other issues involving RFC. It would seem clearly in the public interest that due process of law be maintained in the Trial Court and that the alleged improper conduct by RFC, a wholly-owned Government Corporation, be brought out in Court and corrected.

III. The Court of Appeals for the Fourth Circuit has rendered a Decision in conflict with the Decisions of other Circuit Courts of Appeals in the same matter.

A. The Court of Appeals, in affirming the District Court, held that the claim of the Third Party Plaintiffs against the Third Party Defendants was a separate and distinct cause of action based on fraud and, under Rule 14, should not be joined and decided with the original action based

on a Guaranty, even though both claims arose out of the same factual situation. This is contrary to the decisions of the Court of Appeals for the Third and Eighth Circuits as will be seen by an examination of the following cases:

1. *Third Circuit — Jones v. Waterman S. S. Corp.* (*Reading Co.*, Third Party Defendant), 155 F. 2d 992 (1946 — Biggs, Ct.J.)
2. *Eighth Circuit — Waylander-Peterson Co. v. Great Northern Ry. Co.*, 201 F. 2d 408 (1953, Gardner, C.J.)

B. The Court of Appeals, in affirming the District Court, held that the Guaranty Agreement could be considered apart from the other documents contemporaneously executed and the documents referred to in those documents and Judgment could be rendered against the Guarantors even though the Guarantors had defenses and were discharged by a consideration of the other documents. This is contrary to the decisions of the Court of Appeals for the Eighth and Ninth Circuits as will be seen by the examination of the following cases:

1. *Eighth Circuit — Massachusetts Bonding and Indemnity Co. v. Feutz*, 182 F. 2d 752 (1950 — Gardner, C.J.)
   Layne-Bowler Chicago Co. v. City of Glenwood, Iowa, 34 F. 2d 889 (1929 — Dewey, D.J.)
2. *Ninth Circuit — U. S. F. & G. Co. v. Doheny*, 123 F. 2d 746, (1941 — Healy, Ct.J., Haney, Ct.J. Concurring) c.d. 315 U. S. 817.

WHEREFORE your Petitioners pray that a Writ of Certiorari be issued out of and under the Seal of this Court directed to the United States Court of Appeals for the Fourth Circuit, sitting at Richmond, Virginia, commanding that Court to certify and send to this Court, on a day certain to be therein named, a full and complete Transcript

of the Record and all Proceedings had in this case, numbered and entitled on its Docket No. 6697, to the end that this case may be reviewed and determined by this Court; that the Judgment of the United States Court of Appeals for the Fourth Circuit may be reversed by this Court; and that your Petitioners may have such other and further relief in the premises as may seem just and proper.

AND as in duty bound, your Petitioners will ever pray.

MILTON DUKE,

MORTON L. KEMPER,

JOHN S. MAHLE, RECEIVER OF THE BOND CONSTRUCTION CORPORATION, Petitioners,

BY WILSON K. BARNES,
Attorney for Milton Duke, One of the Petitioners,

BY WILLIAM HOFFENBERG,
Attorney for Morton L. Kemper, One of the Petitioners,

BY JOSEPH LOEFFLER,

HARRY E. GOERTZ,
Attorneys for John S. Mahle, Receiver of the Bond Construction Corporation, the remaining Petitioner.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The references to the Opinions Below are set forth in the Petition at Page 2 thereof.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in this Petition at Page 2 thereof.

STATEMENT OF THE CASE

The Statement of the Case appears in the Petition at Pages 2 to 14 and in the interest of brevity is not repeated here.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals for the Fourth Circuit erred—

1. In holding that a District Court, after it has overruled a Motion to Dismiss a Third Party Complaint and has formally ordered after hearing that Third Party Defendants be joined in an action in the District Court, pursuant to Rule 14 of the Federal Rules of Civil Procedure, during the course of the trial on the merits over a year and a half later but before the trial has been completed, may revoke its prior Order joining the Third Party Defendant and dismissing the Third Party Complaint when Federal jurisdiction of the Original Complaint is predicated upon the Laws of the United States and is not challenged by any of the

parties and when the Third Party Defendants have themselves invoked Rule 14 to bring in Fourth Party Defendants who have asserted affirmative claims against other parties, including the Original Plaintiff.

2. In holding that a District Court may enter Judgment against the Original Defendants in favor of the Original Plaintiff prior to hearing testimony and argument on most of the issues raised by the Pleadings, including the issue of fraud, thus denying the Original Defendants due process of law contrary to the Fifth Amendment.

3. In holding that in a suit between the original parties to a transaction, a District Court may enter Judgment against the Original Defendants as uncompensated Guarantors and disregard the other Contract documents entered into on the same day as part of the transaction and other Contract documents referred therein.

STATUTES INVOLVED

The pertinent provisions of Art. 8, Sec. 2 of the Annotated Code of Maryland are set forth in the Record in the case (R. 253).

ARGUMENT

I. A District Court, after it has overruled a Motion to Dismiss a Third Party complaint and has formally ordered after hearing that the Third Party Defendants be joined in an action in the District Court, pursuant to Rule 14 of the Federal Rules of Civil Procedure, during a course of the trial on the merits over a year and a half later but before the trial has been completed, may not revoke its prior order joining the Third Party Defendants and dismiss the Third Party complaint when Federal Jurisdiction of the original complaint is predicated upon the Laws of the United States and is not challenged by any of the parties and when the Third Party Defendants have themselves invoked Rule 14 to bring in Fourth Party Defendants who have asserted affirmative claims against other parties, including the Original Plaintiff (Specifications of Errors No. 1).

A. There is no power in the District Court under Rule 14 to vacate its prior Order and dismiss the Complaint under the circumstances mentioned.

Rule 14 of the Federal Rules of Civil Procedure in regard to Third Party practice provides in part as follows:

> "(a) *When Defendant May Bring in Third Party.* Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.* If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims

against other third-party defendants as provided in Rule 13. * * * The Plaintiff may assert any claim against the third-party defendant arising out of the *transaction* or occurrence that is the subject matter of the plaintiff's *claim* against the third-party plaintiff. * * * *A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.*" (Emphasis supplied.)

As set out in the Statement of the Matter Involved, the Original Defendants on June 22, 1951, prior to filing an answer to the Original Complaint, filed a Motion to make Frenkil and Baltimore Contractors, Inc., Third Party Defendants following the practice set forth in Rule 14 and using the forms suggested. On the same day, June 22, 1951, the Third Party Summons was issued. The following day, June 23, 1951, the Original Defendants filed their Answer to the Original Complaint.

On July 10, 1951, the Third Party Defendants moved to dismiss the Third Party Complaint (R. 29).

A hearing was had upon this Motion which was tantamount to a Motion to Strike Out the Third Party Complaint already filed pursuant to the ex parte joinder, as well as a Motion to Dismiss the Third Party Complaint (R. 33). At the hearing the Third Party Defendants made all of the same arguments and raised all of the same points that they urged on the latter oral Motion to vacate made on November 6, 1952 during the trial of the case on the merits (R. 35-38).

The District Court, after having weighed these arguments, decided to permit the joinder of the Third Party Defendants to continue and declined to dismiss the Third

Party Complaint. The District Court also decided, as requested by the Third Party Defendants, to permit the Third Party Defendants to join the Bond Receiver and United States Casualty as and when the Third Party Defendants desired to do this (R. 40-43). There was no opposition by the Third Party Plaintiffs to this additional joinder (R. 38, 42, 43).

The Third Party Defendants availed themselves of Rule 14 and on October 31, 1951 (R. 3) filed a Motion to bring in the Bond Receiver and United States Casualty as Fourth Party Defendants (R. 44) filing a Fourth Party Complaint on that day. The Fourth Parties answered and asserted Counterclaims in due course.

1. *Federal jurisdiction is clearly established.*

Federal jurisdiction in the Original Complaint is predicated on 15 U. S. C. A. Sec. 603 which gives RFC power "to sue and be sued, to complain and to defend in any court of competent jurisdiction, state or federal", and apparently also on 28 U. S. C. A. Sec. 1331 conferring original jurisdiction of all civil cases wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs and arises under the Constitution, laws or treaties of the United States. See also 28 U. S. C. A. Sec. 1349 in regard to corporations incorporated under an Act of Congress in which the United States is the owner of more than one-half of its capital stock.

The effect of this legislation and the allegations of the Complaint that the United States owned *all* of the capital stock of RFC and the amount in controversy exceeded $3,000.00, exclusive of interest and costs was that Federal jurisdiction arose under 15 U. S. C. A. Sec. 603 and also the Laws of the United States. See *Marks v. Reconstruction*

Finance Corporation, 129 F. 2d 759 (CCA-4 — 1942 — Dobie, Ct.J.). See also *Machine Tool and Equipment Corporation v. Reconstruction Finance Corporation*, 131 F. 2d 547 (CCA-9 — 1942 — Stephens, Ct.J.).

It is pointed out that the original jurisdiction in this case was *not* predicated upon diversity of citizenship but was based upon 15 U. S. C. A. Sec. 603 *and* upon the Laws of the United States. It is quite clear that RFC *could* have joined both of the Third Party Defendants and both of the Fourth Party Defendants without in any way impairing the Federal jurisdiction in this case.

Indeed, in this case, Federal jurisdiction of the Third Party Complaint and the Third Party Defendants is conceded by Counsel for the Third Party Defendants (R. 191, 192).

2. *The Third Party Joinder and the Fourth Party Joinder are ancillary to the original jurisdiction and Federal jurisdiction is not defeated even though the Third Party Defendants, one of the Fourth Party Defendants and the Original Defendants are all citizens of the same State.*

As pointed out above, the question of diversity of citizenship has no relevance to the present case.

Even if it did, the joinder of Frenkil and Baltimore Contractors, Inc. (a Maryland Corporation) would not defeat the Federal jurisdiction as RFC, the Original Plaintiff, is certainly not a "citizen of Maryland".

The narrow construction of Rule 14, which the Court of Appeals for the Fourth Circuit has adopted, in diversity of citizenship cases has undoubtedly colored the Court's thinking in this case as Circuit Judge Dobie cites *B. & O. R. R. v. Saunders*, 159 F. 2d 481 (CCA-4 — 1947 — Parker, C.J.) (R. 269). See also *Pierce v. Ford Motor Company*, 190 F.

2d 910 (CA-4 — 1951 — Parker, C.J.). Compare *Williams v. Keyes*, 125 F. (2d) 208 (CCA-5 — 1942 — McCord, C.J.). It is submitted that these cases are not at all in point with the case at bar.

The weight of authority throughout the Circuit and District Courts is to the effect that if Federal jurisdiction has attached in the original case, a Third Party joinder is considered as *ancillary* to the original jurisdiction and will not defeat the original jurisdiction.

Waylander-Peterson Co. v. Great Northern Ry. Co., 201 F. (2d) 408 (CA 8th — 1953, Gardiner, C.J.);

Lawrence v. Great Northern Ry. Co. v. Giertsen Co., 98 F. Supp. 746 (D. Ct. Minn. 1951 — Nordbye, C.J.);

National City Bank v. Valldejuli Puig v. Rodriquez, 106 F. Supp. 1 (D. Puerto Rico — 1952);

Roth v. Great Atlantic and Pacific Tea Co. v. Lefrak, 12 F. R. D. 383 (D. Ct. E. D. N. Y. — 1952);

Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Bornemeier, 13 F. R. D. 146 (D. Ct. Neb. — 1952);

U. S. v. Hecht, 9 F. R. D. 339 and 9 F. R. D. 340 (U. S. D. Ct. N. D. Ohio — Kolb, D.J. — 1949).

See also:

Kelly v. Pa. R.R. Co. v. Budd Mfg. Co., 7 F. R. D. 524 at 527;

Moncrief v. Pa. R.R. Co., 73 F. Supp. 815;

Pyzynski v. N. Y. Cent. R.R. Co., 7 F. R. D. 302;

Barron and Holtzoff, Federal Practice and Procedure, Vol. 1, Sec. 424.

The weight of authority is in accord with the policy urged by the commentators that a narrow construction should be abandoned. This is well summarized by John W. Willis,

Managing Editor of Federal Rules Service in a Law Review Article entitled "Five Years of Federal Third-Party Practice", 29 Va. Law Rev. 981. Mr. Willis states:

> "When the Federal Rules came into effect, however, it was urged by commentators that this rule of narrow construction should be abandoned. It was contended that much of the value of the rule would be lost if it were to be straitjacketed by old jurisdictional limitations, and that the third-party controversy should rather be regarded as ancillary to the main action. While Rule 82 provides that the other rules shall not be construed to extend or limit the jurisdiction of the federal courts or the venue of actions therein, it was not felt that the extension of recognized concepts of ancillary jurisdiction to practice under Rule 14 did any violence to this limitation."

It is unfortunate that the Court of Appeals for the Fourth Circuit has not seen fit to advance with the other Courts.

3. *The Third Party Complaint presents a "claim" against the Third Party Defendants who are or may be liable to them for all or part of the Original Plaintiff's claim against the Original Defendants.*

Apparently the real difficulty in the thinking of both the District Court and the Court of Appeals is in connection with the meaning of the word "claim", as contrasted with the old limitations that surrounded the concept of "cause of action".

In the Opinion of the Court of Appeals in this case as in the District Court's opinion, the dominating thought is that because the original suit is based upon a Guaranty and, therefore, a contractural cause of action, it is improper or undesirable to permit the joinder of a Third Party claim based upon fraud — a tort concept — with the original contractural action. The allegations establish that the fraud of Frenkil was the sole cause of the failure of RFC to re-

ceive its money from Bond under the Assignment and but for the failure of RFC to receive its money on the original Note of Bond, there would have been no possible liability of the Guarantors. In addition to this, it is alleged in the Answer of the Original Defendants to the Original Complaint that RFC wilfully participated in and acquiesced in the fraud and as result of this gross negligence and wilful conduct, the Guarantors had been discharged (R. 28). The Original Answer and the Third-Party Complaint set up substantially the identical facts in regard to the fraud, the Answer setting up RFC's participation in that fraud. Duke is *individually* a party to the Subcontract of January 4, 1944, the Assignment of March 19, 1944, and the Guaranty of March 19, 1944. It is hard to visualize a factual situation in which the facts set forth in the Third Party Complaint are more intimately and closely tied in with the claim set forth in the Original Complaint.

Mr. Willis, in the Law Review Article above mentioned, states:

> "*Meaning of 'claim'*. The difficulties experienced in the use of the 'cause of action' concept under the Codes are notorious. It was in the hope of getting away from these old limitations that the Advisory Committee banned the use of the term in drafting the Federal Rules. Throughout the Rules the reference is to the 'claim' or 'claim upon which relief can be granted'. And it seems plain that the intent of the Committee was to substitute for the old cause-of-action idea the 'pragmatic' concept of the cause of action as a 'group or aggregate of operative facts giving ground or occasion for judicial action'.
>
> "The meaning of the word 'claim' is important in the practical application of Rule 14. If the narrow cause-of-action interpretation is used, it is obvious that the 'claim' asserted against the defendant can never be completely identical with the 'claim' against the third-party defendant. Where the third party is alleged to

be liable to the plaintiff, it is not on the same 'cause of action' asserted against the defendant, but a different cause of action. And where the third party is alleged to be liable over to the defendant, a narrow interpretation of the word would limit the use of the rule to cases of indemnity for the precise claim asserted by the plaintiff. The New York courts, although operating under a statute which similarly uses the word 'claim', have given it a rather narrow meaning. The Pennsylvania courts, too, have adopted a restrictive construction.

The majority of the federal district courts, however, have been liberal in their interpretation of the word 'claim' as used in the impleader rule. An excellent example is Judge Knox's decision in *Balcoff v. Teagarden,* (36 F. Supp. 224). In that case, defendant in a copyright infringement action involving the allegedly unauthorized playing of a song impleaded the plaintiff's sister, who had purportedly represented that she had authority to request performance. Plaintiff objected on the ground that on the facts alleged the third party would not be liable for the claim asserted against the defendant, i.e., the claim for copyright infringement. Judge Knox rejected this contention, stating that 'It cannot be questioned that Rule 14 should be liberally construed to the end that circuity of action may be avoided, and that disputed jural relationships "growing out of the same matter" be resolved in one action. * * * To sanction the narrow construction proposed by plaintiff would be tantamount to an emasculation of Rule 14, with a consequent loss of its beneficent objectives'."

The decided weight of authority in the Circuit and District Courts support the liberal interpretation of the word "claim".

Waylander-Peterson Co. v. Great Northern Ry. Co., 201 F. 2d 408 (CA-8 — 1953);

Jones v. Waterman S.S. Corp., 155 F. 2d 992 (CCA-3 — 1946);

Hubshman v. Radco, Inc. v. E. W. Kenngott Co., Inc., 71 F. 2d 601 (D. C. S. D. N. Y. — 1947);

Bernstein v. N. V. Nederlansch-Amerikaansche Stumvaart-Maatschappij, 6 F. R. D. 297 (D. C. S. D. N. Y. — 1946);

Nora v. Pittston Stevedoring Corp. v. T. J. Hammill and Company, Inc. v. Hooper Lumber Company, Inc., 90 F. Supp. 35 (D. C. E. D. N. Y. — 1950).

See also:

Lee's, Inc. v. Transcontinental Underwriters of Transcontinental Insurance Co. v. Samuel R. Rosoff, Ltd., 9 F. R. D. 470 (D. C. Md. — 1949);

Saunders v. Southern Dairies, Inc., 30 F. Supp. 150 (D. C. — 1939);

Kravas v. Great Atlantic and Pacific Tea Co. v. Peoples Pittsburgh Trust Co. v. Davis, 28 F. Supp. 66 (W. D. Pa. — 1939);

Fruit Growers Coop. v. California Pie and Baking Co., Inc., 2 F. R. D. 415 (E. D. N. Y. — 1942);

Watkins v. B. & O. R.R. Co. v. Rochester & Pittsburgh Coal Co., 29 F. Supp. 700 (W. D. Pa. — 1939);

Burris v. American Chicle Co., 29 F. Supp. 773 (E. D. N. Y. — 1939);

United States v. Pryor, 2 Fed. Rules Ser. page 197, case 4 (N. D. Ill. — 1940);

Culmer v. B. & O. R.R. Co., 4 Fed. Rules Ser. page 273, 1 F. R. D. 765 (W. D. Pa. — 1941);

Crim v. Lumber Mutual Casualty Co., 26 F. Supp. 715 (D. C. — 1939).

Contra:

U. S. v. Jollimore v. Holland Furnace Co., 2 F. R. D. 148 (D. Mass. — 1941);

Duke, et al. v. Reconstruction Finance Corp., 209 F. 2d 204 (1954 — CA-4), the case at Bar.

It is apparent that the thinking of the Court of Appeals in the case at bar is not in accord with the thinking of the

great majority of the Judges of the other Circuits and District Courts. In any event, it seems clear that this Court should authoritatively settle this important question of Federal law so that Rule 14 will not be "emasculated", as Judge Knox suggests would otherwise be the case.

4. *There is no provision in Rule 14 for a retrial of a formal adjudication permitting the joinder of Third Party Defendant.*

It is to be remembered that the original joinder was permitted ex parte on June 22, 1951. Later, in October, there was a formal hearing upon the Motion of the Third Party Defendants and after hearing, the District Court on October 15, 1951, overruled the Motion to Dismiss the Third Party Complaint and specifically authorized the Third Party Defendants to be impleaded. This was an exercise of any discretionary power to vacate the prior ex parte joinder. There was no change whatever in the Pleadings or in the issues presented from October 15, 1951, until November 6, 1953, when the Third Party Defendants moved to revoke the Order of October 15, 1951. As between the Original Defendants — Third Party Plaintiffs — and the Third Party Defendants, the situation was identical. The only change was that the Third Party Defendants had themselves invoked Rule 14 and joined the Fourth Party Defendants. It had been held that Rule 14 has no procedure for the revocation of a prior Order permitting the joinder of the Third Party Defendants as that "would only amount to a rehearing or retrial of the same matter upon which the Court has already acted and it is not in order and not contemplated by Rule 14." *Texas Eastern Transmission Corp. v. Standard Accident Insurance Co. v. Andrews Brothers Corp.*, 13 F. R. D. 324 (M. D. Tenn., 1952 — Davies, D.J.).

5. *The Third Party Defendants are estopped to move to vacate the Order of October 15, 1951, during a trial on the merits as they acquiesced in the joinder and invoked the Court's power under Rule 14 to bring in the Fourth Party Defendants.*

The Third Party Defendants might have maintained the position that the granting of the Order of October 15, 1951 was improper. Instead of this, however, they *invoked* the jurisdiction of the Court under Rule 14 to *permit them* to join the Bond Receiver (a Maryland citizen) and United States Casualty as Fourth Party Defendants on the theory that if the Third Party Defendants were liable to the Original Defendants, then the Fourth Party Defendants were liable to the Third Party Defendants (R. 44, 46).

Having invoked the same ancillary jurisdiction and the parties having changed their position, relying on the Third Party and Fourth Party Joinders and the Third Party Defendants having called for and participated in a Pre-Trial Conference in regard to the proof of facts involved in the Third and Fourth Party Complaints, both Frenkil and Baltimore Contractors, Inc., are estopped, during the trial of the case on the merits, to contend that the Third Party Complaint should be dismissed and the Order of October 15, 1951 vacated. *Miller v. Pyrites Company*, 71 F. 2d 804, 807 (CCA-4 — 1934 — Northcott, Ct.J.), c. d. 293 U. S. 604, 79 L. Ed. 696, 55 S. Ct. 121.

6. *The oral Motion of the Third Party Defendants on November 6, 1952 to vacate the Order of October 15, 1951 was not timely.*

The Third Party Defendants knew that the Third Party Plaintiffs, as well as the Fourth Party Defendants, were changing their position and fully preparing for trial on the theory that the Third Party joinder was established.

They knew of the taking of the Frenkil Deposition, the elaborate Requests for Admissions of Facts and Genuineness of Documents under Rule 36, the obtention of documents from the official files of the District of Columbia, the holding of a Pretrial Conference — at the request of the Third Party Defendants — in regard to the question of proof of facts on the merits of the entire case, including the Third Party Complaint, the full opening statements made by Counsel for all the parties and the offering of substantial exhibits, not only on the Original Complaint and its issues but on all of the other issues in the Third Party Complaint and the Fourth Party Complaint. Under these circumstances, it came too late for the Third Party Defendants to present an oral Motion, in the middle of the trial on the merits, to vacate the Order of October 15, 1951. In a less aggravated situation, it has been held that such a Motion is not timely. *United States v. Costa v. Holland Furnace Company,* 11 F. R. D. 492 (W. D. Pa. — 1951).

7. *If the District Court had discretion in the matter and if the Third Party Defendants were not estopped and if their Motion were timely, the action of the District Court would be an abuse of discretion.*

A. The original action in permitting the joinder was proper.

Rule 14 is an important procedural reform, the purpose of which was to avoid delay and unnecessary multiplicity of actions. The Rule should be liberally construed. *United States v. Yellow Cab Company, supra.*

The facts have been considered above but may be summarized as follows:

(1) The Original Plaintiff is not prejudiced by the joinder but is helped.

If the Original Plaintiff recovers against the Original Defendants, it will have an additional source of collection of its Judgment from the person ultimately and *really* responsible for the default in payment. RFC did not complain about the original joinder but has consistently maintained its position of "neutrality" in regard to the joinder.

(2) The facts supporting one of the defenses of one of the Original Defendants are substantially identical with the facts supporting relief against the Third Party Defendants.

A comparison of the Third Party Complaint (R. 11-18) and Paragraph 9 of the Answer of the Original Defendants (R. 21-28) will indicate to this Court that the facts and proof in regard to the defenses under Paragraph 9 in the Answer and the Third Party Complaint are substantially identical. Not only is this established but the facts supporting the Counter-Claim of the Bond Receiver against RFC, Frenkil and Baltimore Contractors, Inc., the Original Plaintiff and the Third Party Defendants respectively, are substantially identical to the facts supporting the defenses in Paragraph 9 of the Answer and the Third Party Complaint (R. 56-66). This indicates the saving of time and expense which otherwise would necessarily be incurred by trying these same issues separately in two separate additional suits.

(3) The Defendants are not and cannot be injured by the joinder.

The basic subject matter of the controversy, namely, the fraudulent conduct of Frenkil, must necessarily be litigated in some forum. These facts *must* be litigated on the defenses set forth in the Original Complaint in this action. It is difficult to see how the Third Party Defendants would be benefited by two long and substantial hearings on the

same facts, one in the Federal Court and one possibly in the State Court at a subsequent time.

There is no jury trial elected in this case so that there can be no confusion of the various issues in a jury's mind.

(4) There will be substantial prejudice to the Third Party Plaintiffs and to the Fourth Party Defendants from the vacating of the Order of October 15, 1951 and the dismissing of the Third Party Complaint.

The Third Party Plaintiffs have expended substantial sums of money in taking Depositions, obtaining documents, filing Requests for Admissions in reliance upon the Original Joinder. Many of the documents and relevant facts are already in the present case as evidence because of the failure of the Third Party Defendants to file a sworn statement in answer to the Request for Admissions, as required by Rule 36. *Bowles v. Batson,* 154 F. 2d 566 (CCA-4 — 1946 — Soper, Ct.J.). Substantially all of the work and preparation of the case will be lost unless this case proceeds in the District Court on all issues raised in the Original, Third and Fourth Party Complaints.

In addition to these considerations, there may be possible defenses in any State Court action of limitations, laches, etc., which cannot be used by the Third Party Defendants in the case at bar. This is particularly true of the case of the Bond Receiver.

(5) The Third Party claims which arise by way of subrogation or indemnity are included within the Rule.

This has been already considered. See the cases cited on Pages 27, 30 and 31 of this Brief. It is apparent that if RFC recovers Judgment against the Guarantors, they would be subrogated to RFC's rights against Frenkil

and his successor Corporation, Baltimore Contractors, Inc., under Requisitions 4 and 5 and the Assignment to the extent of the Judgment. Under Rule 14, it is no longer necessary for the Judgment to be paid before the rights arising by way of subrogation may be litigated in the Third Party Complaint. This is the rule in the Federal Courts even though the law of the State does not permit the assertion of the rights arising by way of subrogation until the Judgment is paid. See *Glens Falls Indemnity Company v. Atlantic Building Corporation,* 199 F. Supp. 60 (CA-4 — 1952 — Soper, Ct.J.). In Maryland, the rights arising by way of subrogation may be litigated in a Third Party action even though the Judgment is not paid. *Northwestern National Insurance Co. v. Rosoff,* 195 Md. 421, 73 A. 2d 461 (1900 — Marbury, C.J.).

Not only do the Guarantors have rights by way of subrogation of the rights of RFC against Frenkil and Baltimore Contractors, Inc., under the Assignment of March 16, 1944 — for the amount of Requisitions Nos. 4 and 5, $19,887.30 and the extras of $34,000.00 — but the Guarantors are entitled to indemnity from Frenkil and Baltimore Contractors, Inc. (his successor corporation) for the entire claim of RFC against the Guarantors, i.e. $34,603.51. This arises out of the fraud of Frenkil in falsely representing that the District of Columbia, as owner, was not paying Frenkil, as Prime Contractor, for the work done and his fraudulent failure to pay the amount of the Requisitions and the extra work although in fact he had been paid by the District of Columbia for the work, as alleged in the Answer of the Original Defendants in the Third Party Complaint and in the Bond Receiver's Answer and Counter-claim.

It is difficult to think of a factual situation more adapted to the use of the Third Party practice under Rule 14 than the one presented in the case at bar.

The case of *Lee's, Inc. v. Transcontinental Underwriters v. Rosoff*, 9 F. R. D. 470 (1949 — D. C. Md.) and the case of *State of Maryland v. Robinson v. Oursler*, 74 F. Supp. 276 (1947 — D. C. Md.) are clearly distinguishable from the case at bar. In those cases, the jurisdiction was originally based on diversity of citizenship and the Motion to Dismiss the Third Party Complaint was made before trial on the merits or any change in position. The situation in those cases would be analogous to a situation in which in this case the District Court had *granted* the Motion to Dismiss the Third Party Complaint on October 15, 1951. In this case, the District Court *overruled* the Motion and permitted the joinder. In the *Lee's, Inc.* case, 39 cases arising out of the same transaction were already in the State Courts arising out of an explosion, and it harmed no one to permit the fortieth case (a removed case) to be tried with the other cases in the State Court. In the *Robinson* case, the original case could never be tried on its merits because it had been settled and released. These facts clearly distinguish the *Lee's, Inc.* case and the *Robinson* case from the case at bar.

It seems clear from the cases cited that this Court should now finally determine the important questions of Federal law and Federal practice which have arisen under Rule 14. It would be contrary to the public interest to have narrow and technical judicial constructions of the provisions of Rule 14, disregarding as a practical matter the beneficent policy intended by this Court and its Advisory Committee in promulgating Rule 14. If the decision in the case at bar is allowed to stand, and if it is generally followed throughout the United States, Rule 14 will be greatly impaired, if not destroyed, as an effective procedural reform.

II. The District Court may not enter judgment against the Original Defendants in favor of the Original Plaintiff prior to hearing testimony and argument on most of the issues raised by the pleadings, including the issue of fraud, as this denies Original Defendants Due Process of Law contrary to the Fifth Amendment (Specifications of Errors No. 2).

The District Court in the beginning of this case attempted to find a "short-cut" for the disposition of the case by trying first (and only) the relatively narrow issue as to whether or not there had been an alteration in the Loan Authorization subsequent to the integration of the Contract on March 16, 1944 (R. 87-88). As happens in these situations, the Court admitted and all parties offered testimony relating not only to the single issue being tried but to other defenses and issues in the case. The Original Plaintiff offered 19 documentary Exhibits, the Third Party Defendants offered 9 documentary Exhibits, and Duke and the Bond Receiver offered one documentary Exhibit each in addition to the 20 documentary Exhibits and Admissions of Fact contained in the Duke and Kemper Requests for Admissions under Rule 36.

There were, however, several important documents, such as the Loan Agreement, executed on March 16, 1944 and referred to in the Guaranty of Duke and Kemper, as well as other documents which had not been offered in evidence and which are not a part of this Record. No testimony was taken upon the issue of whether or not the obtention of an Apportionment Agreement was a part of the contractural arrangement and whether or not there had been a failure to obtain that Agreement.

A. The Issue of Frenkil's Fraud and RFC's Participation Therein was not Passed on by the District Court.

The issue of Frenkil's fraud, raised in both the Answer to the Original Complaint and in the Third Party Complaint, and RFC's wilful participation and acquiescence therein was not considered and no testimony was taken on this issue. There were also the issues in regard to limitations and laches. The District Court, however, took no testimony and heard no argument in regard to these issues although the Record indicates that both the District Court and Counsel for all parties expected the District Court to proceed with the other issues as soon as the Court had disposed of the single issue of alteration (R. 85, 87, 88, 182, 186, 187, 196, 197).

B. The Issue of RFC's Failure to Obtain an Apportionment Agreement was not Passed on by the District Court, but was Erroneously Considered by the Court of Appeals.

The District Court heard neither testimony nor argument in regard to the failure of RFC to obtain an Apportionment Agreement as agreed. The Court of Appeals, however, notwithstanding this, proceeded to pass upon the issue.

The Court of Appeals is in error in stating that the failure of RFC to obtain the Apportionment Agreement, as agreed between RFC and Duke and Duke and Kemper "would be an attempt to add to a written Guaranty Contract by parole" (R. 265).

In the first place, this issue, like the issue of Frenkil's fraud and RFC's wilful participation therein, was never considered, argued before or passed upon by the District Court (except by entering a Judgment prematurely) as an

examination of the District Court's "First Opinion" and following remarks will show (R. 182-186).

In the second place, the allegations of the Answer of Duke and Kemper to the Original Complaint do not state how the Agreement to obtain the Apportionment Agreement is evidenced — whether in writing or by parol; the Court of Appeals, without any proof, assumes it would be proved by parol evidence.

In the third place, this is also an agreement "between * * * any other party and Reconstruction Finance Corporation at the time in force" to which the Guaranty was subject by its terms (R. 226).

In the fourth place, it is well settled by the authorities generally that even if the Guaranty were unconditional (which is not the case) and even if it were sought to establish the agreement by parol evidence (of which there is no allegation in the Pleadings or in evidence), such parol evidence would be admissible — not to contradict or vary the Guaranty but to show that the obtention of the Apportionment Agreement was a condition precedent to the Guaranty becoming effective as a binding obligation between the parties. This is the Maryland Law. *Beall v. Poole,* 27 Md. 645 (1867 — Weisel, J.).

The Court of Appeals cites no authority for its position. Its holding is contrary to the following decisions of this Court and in the Fifth, Sixth and Eighth Circuits.

Hartford Fire Insurance Co. v. Wilson, 187 U. S. 467, 23 S. Ct. 189, 47 L. Ed. 261 (1903 — Brewer, J.);

Burke v. Dulaney, 153 U. S. 228, 14 S. Ct. 816, 38 L. Ed. 698 (1894 — Harlan, J.);

Fifth Circuit:

Liebling v. Florida Real Estate Investment Corp., 24 F. 2d 688 (1928 — Bryan, Ct.J.);

Sixth Circuit:

American Surety Co. of N. Y. v. Egan, 62 F. 2d 223 (1932 — Moorman, Ct.J.);

Eighth Circuit:

Pet Milk Co. v. Boland, 175 F. 2d 151 (1949 — Collet, Ct.J.). See especially Page 157 for a collection of the cases generally.

In any event, the Original Defendants are at least entitled to be heard upon this point and have the District Court pass upon it after hearing and not prior thereto! It is important to the public, as well as to the particular litigants, that a Trial Court should not be permitted to rule finally before it has heard either testimony or argument of Counsel on substantial defenses. This is an elementary concept of due process of law to which the Original Defendants are entitled by the Fifth Amendment to the Constitution of the United States. This Court should not deny its vindication in the Courts of the United States.

In short, there was a *partial* trial of the case on the merits on the Original Complaint with many of the preliminary documents placed in evidence upon the trial of a single issue of alteration of one of the Contract documents, but without the oral testimony of the parties and their witnesses on the other issues raised in the original case. In the Exhibits appear the Summonses and Subpoenas Duces Tecum issued by Duke and Kemper for the trial of the case. These included Subpoenas for Frenkil and Paceo, the President of Atlas, the excavating company. Frenkil issued a Subpoena Duces Tecum for documents in the District of Columbia and issued a Summons for an official of the District of Columbia to testify.

It is elementary that parties are entitled to their "day in Court" upon the issues raised by the Pleadings and are at least entitled to have their Counsel argue the matters before the District Court. To deny them these rights would result in a denial of due process of law in the procedural, as well as the substantive sense, contrary to the provisions of the Fifth Amendment. *Postal Telegraph-Cable Co. v. Newport*, 247 U. S. 464, 476, 38 S. Ct. 566, 62 L. Ed. 1215, 1221 (1918) in which case Mr. Justice Pitney states: "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings." See also *Truax v. Corrigan*, 257 U. S. 312, 332, 42 S. Ct. 124, 66 L. Ed. 254, 263 (1921 — Taft, C.J.).

Not only should this Court see to it that the Constitutional rights of the Original Defendants in regard to due process of law in this case are preserved, but it is important from the public viewpoint that the wilful participation and acquiescence of RFC in the fraud of Frenkil, the apparent change of mind in regard to suing Frenkil, the suit against the uncompensated Guarantors and not Frenkil some six and one-half years later, all should be heard in Court and decided on the merits. It is important to the public that the conduct of the public business by wholly-owned agencies of the Government be properly conducted and not tainted by fraud and favoritism.

C. The Issues Raised By The Bond Receiver As Fourth-Party Defendant In The Counter-Claim Against RFC, The Original Plaintiff, Have Not Been Disposed Of By The District Court.

The Bond Receiver was made a Fourth Party Defendant by the action of Frenkil and Baltimore Contractors, Inc., the Third Party Defendants. This was pursuant to a ruling of

the District Court. The Bond Receiver thus became a Party Defendant in the case and pursuant to Rule 13 of the Federal Rules of Civil Procedure asserted an affirmative Counter-Claim against both Frenkil and Baltimore Contractors, Inc., the Third Party Defendants, *and* against RFC, the Original Plaintiff.

There was no Motion to Vacate the Joinder of the Fourth Party Defendants, and no Order has been passed to that effect. No Order has been passed dismissing the Counterclaim, no testimony has been taken in regard to it and the matter has never been argued. Surely the Bond Receiver who was compelled to come into the action at the instance of the Third Party Defendants, Frenkil and Baltimore Contractors, Inc., and who is a party to the case at bar with the approval of the State Court (R. 54-55) upon the petition of Frenkil and Baltimore Contractors, Inc., cannot be eliminated from the case without a hearing, a Motion or an Order of Court passing upon the important issues raised by him. See *United States Industrial Chemicals v. Carbide & Carbon Chemicals Corp.*, 52 F. Supp. 164 (S. D. N. Y. — Caffey, D.J. — 1943).

It must be kept in mind that the Bond Receiver asserted a claim against RFC arising out of the transaction set forth in the Original Complaint. Bond executed the note set forth in the Original Complaint. Bond and Duke executed the Assignment given as security for the note, as well as the Subcontract, the payments under which were assigned. The Assignment is an integral and vital part of the "transaction" (Rule 14) and cannot be severed from the transaction. Surely the Bond Receiver could have intervened in the Original action to protect the amount of Bond's own liability under the note and other documents under Rule 24. The Bond Receiver would have been a party to the

Original action for all purposes, and the Bond Receiver's rights could not be ignored and passed over without testimony, argument and adjudication by the District Court. The situation is not essentially different when the Bond Receiver is brought in by the Third Party Defendants (with the permission of the State Court) and *asserts a claim against the Original Plaintiff*. Under these circumstances, a dismissal of the Third Party Complaint does not result in an automatic disposition of the Fourth Party's counterclaim against the Original Plaintiff, as apparently assumed (but not stated) by the District Court and the Court of Appeals.

But apart from the foregoing, will this Court permit injury to be added to delay? The Bond Receiver and the Bond creditors may suffer a loss of $19,887.30 in consequence of the disclosure of the relations between RFC and Frenkil and Baltimore Contractors, Inc., at the partial trial, that two invoices aggregating this sum were treated by RFC as equivalent to accounts receivable. Thus, if a new action must be filed in the State Court, this would afford the debtors an opportunity to plead the Maryland Statute of Limitations of three years for these two items as simple debts, not under seal. Article 57, Sec. 1 of the Annotated Code of Maryland, 1951 Edition. The debtors failed to plead limitations in the present action, and under the Maryland law, they cannot rely on this defense. *Bannon v. Lloyd*, 64 Md. 48, 20 A. 623 (1885 — Robinson, J.). *See also Snyder v. Cearfoss*, 187 Md. 635, 639, 51 A. 2d 264 (1947 — Delaplaine, J.); *Frank v. Wareheim*, 177 Md. 43, at 57, 7 A. 2d 186 (1939 — Parke, J.).

The dismissal of the Bond Receiver, therefore, under these circumstances, constitutes an abuse of discretion of the first magnitude, because it is inconceivable that the

framers of the Federal Rules of Civil Procedure contemplated the entertainment of jurisdiction to the exclusion of the State Courts and a later dismissal with a resulting injury or damage to a party. Such is the case here.

It is important that a State Court Receiver, having been properly made a party to litigation in the Federal Court, should not be denied a hearing in the Federal Court on substantial issues raised by the Receiver in the case, and this Court should grant the Writ of Certiorari prayed for in this case to correct this situation.

III. In a suit between the Original Parties to a transaction, a District Court may not render judgment against the Original Defendants as uncompensated guarantors on a guaranty and disregard the other contract documents entered into on the same day as a part of the same transaction and other contract documents referred to therein (Specifications of Errors No. 3).

The Court of Appeals and the District Court held that the Duke and Kemper Guaranty was to be given effect without regard to (a) the other Contract Documents contemporaneously executed on March 16, 1944, and (b) the documents referred to in those documents.

An examination of the Note of March 16, 1944 (R. 220-224) discloses immediately that it is one document in a *series* of documents. On the printed form appears "RFC Form L-180" and in large type appears "EXHIBIT F". This Note, in defining the term "Collateral" includes "guaranties" and "agreements" (R. 221). The Guaranty of March 16, 1944 is also a printed RFC Form "RFC L-10" and specifically refers to the Note of March 16, 1944 (R. 225).

In the Opinion of the Court of Appeals, a part only of the Guaranty conferring very broad powers on RFC to deal

with the collateral is set forth (R. 264). The vital and important limitation on those broad powers *is not quoted.* In its place are asterisks (R. 264).

This vital limitation is:

> **"* * * but subject to the provisions of any agreement between the debtors or any other party and Reconstruction Finance Corporation at the time in force, * * *" (R. 226).**

The Guaranty by its terms was subject to the Loan Agreement of March 10, 1944 between Bond and RFC wherein it was agreed, in Paragraph 1, "It (Bond) will use the proceeds of the loan for the purposes set forth in the Authorization issued by Reconstruction Finance Corporation." (Note: This document has not yet been introduced into evidence because of the premature ruling by the District Court; it is not disputed, however, that it was executed and contains the provision quoted). This Loan Agreement by reference incorporates the Loan Authorization, approved March 9, 1944.

In addition to the Loan Agreement and the Loan Authorization, the Assignment of March 16, 1944 is an agreement between Bond and RFC and was the primary security for the loan. There were also another Guaranty, an Affidavit and a Stand-by Agreement, all executed on March 16, 1944 as part of the same transaction.

The security arrangement was a natural one, namely, that as Bond, the Subcontractor, did the work on the Ft. Stanton Reservoir job and as this work was accepted and approved by Frenkil and the 90% partial payments were due, Frenkil, the Prime Contractor, would pay those amounts due to RFC. After the receipt of invoices, duly approved by Frenkil, RFC would (and did) advance to Bond up to $12,000.00

over and above the amount of approved invoices. Mr. Schaaf, the Supervisor of Loan Examiners, in testifying for RFC, stated that these approved invoices were *"the equivalent of Accounts Receivable"* (R. 107). Upon delivery of the approved Requisitions or invoices to RFC, by virtue of the Assignment of March 16, 1944 and the Maryland Statute, Art. 8, Sec. 2 of the Annotated Code of Maryland (1951 Edition) (set out in full, R. 253), the money due, or Account Receivable, became *vested* in RFC. After this occurred, RFC *must* look to Frenkil for payment of that approved Requisition and not to the Guarantors. This was an "existing agreement" to which the Guaranty was subject by its terms.

The Guaranty was, therefore, not the practically unlimited and unconditional guaranty suggested in the Opinion of the Court of Appeals but was *definitely limited* by the Loan Agreement, the Assignment, the Loan Authorization and the other Contract documents. It was a Conditional Guaranty and not an unconditional guaranty. This clearly distinguishes the case at bar from the cases cited in the Opinion of the Court of Appeals (R. 265), all of which dealt with unlimited and unconditional guaranties.

In view of these facts, the ruling of the District Court before all of the Contract documents were offered into evidence and the disregard of those that had been offered into evidence is contrary to the authorities generally and particularly the following cases in the Eighth and Ninth Circuits.

Eighth Circuit:

Massachusetts Bonding and Indemnity Company v. Feutz, 182 F. 2d 752 (1950 — Gardner, Ct.J.).

In this case, the Court held that a surety bond and a contract referred to in the surety bond would be construed as one instrument. The Court said at page 757 (quoting from *Peterson v. Miller Rubber Co.*, 24 F. 2d 59:

> "A contract may be contained in several instruments. These, if made at the same time in relation to the same subject matter may be read together as one instrument, and recitals in one may be explained or limited by reference to the other. This Rule obtained even when the parties are not the same, if the several contracts were known to all the parties and were delivered at the same time to accomplish an agreed purpose."

Layne-Bowler Chicago Company v. City of Glenwood, Iowa, 34 F. 2d 889 (1929 — Dewey, D.J.). In this case, a construction contract and a surety bond were read together and construed with reference to each other.

Ninth Circuit:

United States Fidelity & Guaranty Co. v. Doheny, 123 F. 2d 746 (1941 — Healy, C.J., Haney, C.J., concurring), c. d. 315 U. S. 817, 86 L. Ed. 1215.

It is important to the public that this conflict in the Circuits be resolved, particularly as the decision of the Court of Appeals for the Fourth Circuit in the case at bar is contrary to the law generally established on this important question.

CONCLUSION

For the reasons and upon the authorities above set forth, this Court should grant the Petition for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit and reverse the Judgment of the Court of Appeals in this case and require the Respondents to pay the Costs.

Respectfully,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 657

MILTON DUKE, MORTON L. KEMPER AND JOHN S. MAHLE, RECEIVER OF THE BOND CONSTRUCTION CORPORATION, PETITIONERS

v.

RECONSTRUCTION FINANCE CORPORATION, VICTOR FRENKIL, INDIVIDUALLY AND TRADING AS BALTIMORE CONTRACTORS, BALTIMORE CONTRACTORS, INC., AND UNITED STATES CASUALTY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland on the claim of the Reconstruction Finance Corporation (R. 182–186) is not reported. The opinion of that court on the motion of the third-party defendants to dismiss the third-party complaint (R. 200–213) is reported at 18 Fed. Rules Serv. 14a.15, Case 2. The opinion

of the United States Court of Appeals for the Fourth Circuit (R. 261–269) is reported at 209 F. 2d 204.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1954 (R. 269). The petition for a writ of certiorari was filed on March 26, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether this Court should review an award to Reconstruction Finance Corporation on an unconditional guaranty where the guarantor petitioners, who now claim that the judgment was premature for failure to consider further evidence on the scope of the guaranty, did not indicate in the District Court how such evidence would or could have affected the result.

2. Whether the District Court should have refused judgment on an unconditional guaranty because the creditor had failed to take action against other persons who might have been liable.

3. Whether the District Court should have admitted parol evidence of an agreement whose performance was not pleaded as a condition precedent to the guaranty and whose terms would not have affected the operation of the guaranty.

4. Whether, in the particular circumstances, the assignment to a creditor of claims of a subcontractor against the prime contractor requires that

the creditor proceed on these claims before making demand of the subcontractor's guarantors.

STATEMENT

This action arose over a guaranty made by petitioners Duke and Kemper to secure a loan by the Reconstruction Finance Corporation (RFC) to the Bond Construction Corporation (Bond). Bond had entered a subcontract for $85,400 with prime contractor Frenkil (trading as Baltimore Contractors) to do certain work in the construction of a reservoir for the District of Columbia. In order to finance its work, Bond applied for a loan of $71,500 from the RFC on February 2, 1944 (R. 216). The loan was recommended by an agency examiner on February 21, 1944 (R. 231), and was authorized by the Agency Review Committee on March 9 (R. 218, 220); both the recommendation and the authorization called for collateral including an "unconditional guaranty" from Duke and Kemper (R. 237, 219).

A note was executed by Bond on March 16, 1944 (R. 220), and among other documents delivered to RFC were (i) an assignment to RFC by Bond and Duke (who was president of Bond) of all moneys due or to become due under the subcontract with Frenkil (R. 244), and (ii) the guaranty of Duke and Kemper (R. 225). The assignment was accepted by Frenkil on March 24, 1944 (R. 247).

Bond began work in May 1944, but stopped on October 11, 1944, before completion, and turned the work over to Frenkil (Pet. 7). Bond's discontinuance resulted from financial difficulties, which it laid to Frenkil's failure to meet payments in accordance with the subcontract, and it later went into receivership.

The failure of Bond left it with a balance owing on its note to RFC, and demand for this amount was made on the guarantors (petitioners Duke and Kemper) on January 11, 1945 (R. 118), and on the receiver (petitioner Mahle) on January 17, 1945 (R. 117). RFC brought suit on March 13, 1951 (R. 2) against the guarantors only, as the guaranty had expressly provided might be done (R. 227). The guarantors' defense (R. 18–29) was based primarily on the allegation that by withholding payments Frenkil had fraudulently forced Bond off the reservoir project when its work was almost finished in order to complete the work himself, and that RFC, knowing this, had failed to seek its redress from him, and was therefore itself guilty of gross neglect, laches, and fraud. The answer further alleged that RFC had promised to enter an apportionment agreement with United States Casualty Company, surety for Bond's performance on the subcontract; that this agreement would have provided that a part of the payments to be made by the surety upon Bond's default would be paid to

RFC; that the agreement had not been entered (R. 22) and that the guarantors were therefore discharged (R. 28). The guarantors further averred that RFC had advanced a balance of more than $12,000 in contravention of a provision in the loan arrangement and, at the trial, also claimed that a provision of the loan authorization had been altered subsequent to the making of the loan.

The District Court found that the alteration in question had been added before the loan was made, and that the $12,000 limitation did not apply to the balance owing RFC (R. 182–186). The court then indicated that it would give judgment as prayed for by RFC (R. 186). Counsel for Frenkil, a third-party defendant,[1] at this point moved anew to dismiss the action against him (R. 189), and an opinion granting this motion was rendered on March 31, 1953 (R. 200–213). No evidence was taken on the question of the apportionment agreement, on the alleged collusion between RFC and Frenkil, or on certain documents in the loan transaction, notably the Loan Agreement of March 10, 1944, but judgment for $34,603.51 was entered for RFC on April 17, 1953 (R. 214).

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[1] The District Court had earlier granted the motion of Duke and Kemper to join Frenkil and his company as third-party defendants. Pet. 8–9, 10–11; R. 262. Frenkil then joined petitioner Mahle, Bond's receiver, as a fourth-party defendant. Pet. 11; R. 262.

Of the extensive third- and fourth-party proceedings instituted—set out in full in the Petition for a Writ of Certiorari (pp. 8–12)—only one involved RFC: a counterclaim by Mahle, the Bond receiver, a fourth-party defendant, against RFC alleging that by reason of the assignment from Bond to RFC he had been unable to proceed against Frenkil for amounts claimed to be due Bond, and praying that the assignment be declared of no further force and effect (R. 55–68). This counterclaim was not formally determined or dismissed.

ARGUMENT

What petitioners are asking of this Court is not that it review a decision on an important question of law but, rather, that it reexamine a particular set of circumstances, pertinent to this case only, which have already received the attention of both the District Court and the Court of Appeals. Moreover, they seek this review without revealing any reason to believe that a reversal in this Court would at all affect the ultimate result in the case. On the contrary, it appears from the documents in the record that, substantively, petitioners' cause is without merit, and that the procedural "error" of which they complain against RFC is wholly of their own making. In these circumstances, there is no call for this Court to take jurisdiction.

1. The petitioners' contentions in this Court, insofar as they affect RFC (Pet. 15, 17–18, 19, 39–49), are all based on the argument that the District Court acted prematurely in granting judgment for RFC without hearing testimony and considering documents which the petitioners claim were essential to a full hearing. But it should be noted in this connection that after the District Court had rendered its initial decision, and counsel for RFC had suggested that a judgment for his client might be entered immediately, counsel for petitioners Duke and Kemper said only (R. 186):

> I think we ought to wait until the end of the case. There is some additional testimony that ought to come in which will bear on this. There is another agreement which has not been introduced in evidence, the loan agreement itself. I think Your Honor should withhold final determination on that until the end of the case.

At this point the court stated that it would not sign the order at that time, although it clearly indicated that it felt the RFC aspect of the case was closed (R. 186). Counsel for the petitioners still failed to register an effective protest; he did not indicate in any way what he hoped to prove from further evidence, or how he would proceed to prove it. And just a few moments later, when he was asked what course the trial would take, he failed to specify how any showing which he would

make might reflect against RFC (R. 187–188). Moreover, he was at this point under no illusion as to the court's position that the petitioners' liability to RFC had been finally decided (R. 196). Even if it were not true—as we shall show below is true—that further evidence would have been unavailing, it should be too late now to seek review in this Court of a case controlled by peculiar circumstances, where the petitioners have completely failed to argue their claimed rights in the trial court.

2. The petitioners' allegations of fraud and negligence[2] reduce to a contention that the guaranty of payment (R. 225) was discharged because RFC did not diligently enforce its rights against collateral security additional to the guaranty, and this despite an express provision that RFC (R. 227–228):

> * * * shall not be required, prior to any such demand on, or payment by, the undersigned [guarantors], to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral.

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[2] The guaranty in question was under seal (R. 229), and the suit was at law, not in equity. Hence, petitioners' argument directed to the subject of laches is obviously inappropriate, and there is no claim that limitations has run.

Even without this express provision, the law applicable to guaranties of "payment", as opposed to guaranties of "collection", is that no resort need be had against the principal debtor or against other collateral before proceeding against the guarantor. *Terry* v. *Tubman,* 92 U. S. 156, 160. Such guaranties are said to be "unconditional" (Stearn's *Law of Suretyship,* Elder's Revision (5th Ed. 1951) 65), and it is noteworthy that here both the loan recommendation and the loan authorization call for an "unconditional guaranty."[3] The petitioners argue (Pet. 47) that, nevertheless, the guaranty was not unconditional since it was "subject to the provisions of any agreement between the Debtor or any other party and Reconstruction Finance Corporation at the time in force," and they cite several documents as incorporated by this provision. But except for the so-called apportionment agreement (discussed below) the petition does not indicate what effect any of those agreements which were not before the courts below might have had, and indeed there is no indication that the documents would have had any effect at all. From petitioners' scanty discussion of these agreements,

[3] The Court of Appeals quotes and discusses the other provisions of the guaranty showing conclusively that it was unconditional and that RFC could go against petitioners without seeking recovery from others or from collateral (R. 264–265).

one would have to conclude that they are wholly irrelevant. See also *infra*, pp. 12–14.

3. In this connection, petitioners also contend that the District Court erred in rendering a judgment without hearing evidence on or deciding the merits of their allegations that (R. 22–23):

> It was agreed between Duke and Kemper and the R. F. C., as part of the agreement or arrangement, that an apportionment agreement [be made] between the R. F. C. and the United States Casualty Company, a body corporate, surety on the construction bond given by Bond and Duke for the faithful performance by them of the Sub-contract of January 6, 1944, which apportionment agreement would have provided that in the event of default by Bond and Duke, the United States Casualty Company, as surety, would have paid a proportion of payments made by it to R. F. C. This apportionment agreement, however, was never actually entered into by R. F. C. and the United States Casualty Company, as surety.

They further submit that the Court of Appeals was in error in proceeding to pass upon this issue and holding that any evidence would be "an attempt to add to a written guaranty contract by parole" (R. 265).

The admissibility of evidence relating to the so-called apportionment agreement was strictly a question of law—the application of the parol

evidence rule—and there was therefore no error on the part of the Court of Appeals in deciding the question. Petitioners argue, however, that the court, without any proof, assumed that the alleged promise covering this apportionment agreement was to be proved by oral evidence, and it is true that the answer does not disclose the nature of the evidence they intended to submit. But it does not appear from the record that counsel for the petitioners made any specific protest or proffer on this point in the trial court when they had an opportunity to do so, and they do not even now declare that they have contemporaneous written proof of the agreement. In these circumstances, this Court should not take jurisdiction simply to decide what is, so far as now appears, a wholly academic issue unrelated to the real facts of this case.

The petitioners likewise contend that if they sought to establish the agreement by parol evidence it would nevertheless be admissible because it would show that obtaining the apportionment agreement was a condition precedent to the guaranty. But the petitioners did not plead in their answer that the apportionment agreement was such a condition; they merely alleged that it was a part of the entire loan transaction. Any evidence in support of that allegation would only vary the terms of the contract, contrary to the parol evidence rule, and would not prove that it

was invalid or that its existence was conditioned on the apportionment agreement.

In addition, the petitioners' argument that the promise to enter the apportionment agreement was an agreement to which the guaranty was subject by its terms ignores the distinction between a contract subject to the provisions of other agreements and a contract conditioned on the performance of other agreements. Nothing in the apportionment agreement, even if it had been made, would have altered the obligation of the guarantors who had expressly agreed that their liability would not depend on RFC's having first proceeded against any other person.[4]

4. Petitioners Duke and Kemper contend, finally, that the District Court could not render judgment on the guaranty "and disregard the other contract documents entered into on the same day as a part of the same transaction and other contract documents referred to therein" (Pet. 22, 46–49). However, as noted above (*supra*, pp. 9–10), petitioners do not indicate what

[4] It may also be noted that the apportionment agreement in question is designed only for use with prime contracts for the furnishing of supplies to the United States. As the Court of Appeals stated, it would be inappropriate to a subcontract because, upon default of the subcontractor, the rights and duties of the prime contractor and his sureties would intervene and limit the right of RFC and the subcontractor's surety to complete the contract and earn the sums payable (R. 265). It is upon this right that the apportionment agreement is entirely based.

they hoped to establish through the introduction of such documents as were not before the trial court. This Court should not grant review where the petitioners have failed to show how a procedural error of the courts below, if error there was, has resulted in a definite and vital injury to a meritorious cause.

In fact, the major document with which the petitioners seek to bolster their substantive position (Pet. 47–48) is one *which was before the District Court*—the assignment of March 16, 1944, from Bond (the subcontractor) and Duke to RFC. It is said that any requisitions for payment by Bond, the subcontractor, upon the prime contractor (Frenkil) which were not honored by him nevertheless vested in RFC the subcontractor's rights against him by virtue of this assignment. We do not dispute this. But it does not follow that RFC must therefore seek from Frenkil any amounts represented by these requisitions, and cannot go against the guarantors. Petitioners ignore the fact that, so far as RFC was concerned, these requisitions represented not payments but collateral (R. 218, 233), and that the guaranty expressly gave RFC the right to "deal in any manner with * * * the collateral" (R. 226), and thus to proceed against, or to forbear with respect to, any part of it. RFC was thereby assured that it would not have to contest any defenses or counterclaims which Frenkil might

have against the subcontractor.[5] Any requisitions which may have been accepted did not act to discharge the guarantors.

5. Petitioner Mahle, receiver of the Bond Construction Corporation, a fourth-party defendant in the District Court, counterclaimed to have the assignment from Bond and Duke declared to be of no further force and effect.[6] His contention was that the failure of RFC to enforce the assigned claims against Frenkil, after the receiver had given it reason to believe that Frenkil had acted fraudulently, had prejudiced the receivership estate since he was precluded by the assignment from proceeding against Frenkil on the estate's behalf. The basic demand seems to be that RFC must be forced to choose between proceeding itself against Frenkil and permitting the receiver to do so.[7] This position ignores the clear provisions of the note, by which Bond—in whose place the receiver stands—gave RFC full discretion in dealing with the collateral, including the right of forbearance. Moreover, as the Bond estate is primarily liable on the note,

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[5] Frenkil's acceptance was expressly made "subject to all conditions of the contract" (R. 247).

[6] This point is not contained in the Questions Presented (Pet. 15) or the Specification of Errors to be Urged (Pet. 21–22), but is discussed in the brief in support of the petition (Pet. 43–46).

[7] Like the guaranty, the assignment was executed under seal, and there can be no suggestion of bar by lapse of time. See fn. 2, *supra*, p. 8.

RFC cannot equitably abandon any rights which have been assigned to it since the guarantors, by meeting their obligation on the note, will become subrogated to those rights. The estate was given its opportunity to acquire any necessary right to proceed against Frenkil on the subcontract when demand for payment was made by RFC upon it on January 17, 1945.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari, insofar as it affects the Reconstruction Finance Corporation, should be denied.

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* RFC takes no position on the propriety of the District Court's dismissal of the third-party action (see *supra*, p. 5), except insofar as the receiver's counterclaim may have been affected thereby.

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